

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA**

**DAVID J. CATANZARO,**

**PLAINTIFF**

**v.**

**CANDYRIFIC, LLC, WAL-MART  
STORES, INC., TARGET  
CORPORATION, TOYS “R” US,  
INC., KMART CORPORATION,  
WALGREENS, CO.; and DOES 1  
THROUGH 50**

**DEFENDANTS.**

**CIVIL ACTION NO. 3:15-CV-554**

**JUDGE MANNION**

**MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO  
TRANSFER VENUE**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant CandyRific, LLC (“CandyRific”) hereby moves to dismiss for failure to state a claim upon which relief can be granted. In the alternative, under the first-to-file rule, CandyRific moves to dismiss or transfer this case to the U.S. District Court for the Western District of Kentucky, where the same disputed issues are pending and have been pending prior to initiation of this action.

The Complaint filed by Plaintiff David J. Catanzaro (“Mr. Catanzaro”) fails to state a claim upon which relief can be granted because, based on the plain allegations in Mr. Catanzaro’s Complaint, the patent-in-suit is unenforceable. The Complaint acknowledges that the patent-in-suit, U.S. Pat. No. 7,653,959 (“the ‘959

patent”), is subject to a Terminal Disclaimer as to U.S. Pat. No. 6,026,532 (“the ‘532 patent”). Doc. 1 at ¶¶ 12-13. The Complaint also concedes that such a Terminal Disclaimer requires common ownership of the ‘959 and ‘532 patents for the ‘959 patent to be enforceable. Doc. 1 at ¶ 13. The Complaint additionally states that there is no common ownership between the two patents because the ‘532 patent was assigned to Church & Dwight Co., Inc. on February 28, 2011. Doc. 1 at ¶ 12. The Complaint further admits that there cannot be common ownership between the two patents in the future because the ‘532 patent has expired. Doc. 1 at ¶ 14. Accordingly, the ‘959 patent is unenforceable, and Mr. Catanzaro’s Complaint for infringement of the ‘959 patent fails to state a claim upon which relief can be granted.

In the alternative, this case should be transferred to the U.S. District Court for the Western District of Kentucky where the senior action is pending. On March 12, 2015, CandyRific filed a Complaint for Declaratory Judgment against Mr. Catanzaro in the U.S. District Court for the Western District of Kentucky, seeking declaratory judgment that the ‘959 patent is unenforceable and not infringed by CandyRific. *CandyRific, LLC v. David Joseph Catanzaro*, Case No. 3:15-cv-209-CRS (W.D. Ky.). See Declaratory Judgment Complaint attached hereto as Exhibit A. Subsequently, Mr. Catanzaro filed his Complaint in this Court on March 19, 2015, alleging that the ‘959 patent is enforceable (Doc. 1 at ¶ 20) and

that the accused CandyRific products infringe the '959 patent (Doc.1 at ¶¶ 24-29). Under the first-to-file rule, because the cases involve the same subject matter, this later-filed case should be dismissed or transferred to the U.S. District Court for the Western District of Kentucky.

This Motion is based on the Brief in support filed concurrently herewith. For the foregoing reasons and for the reasons set forth in the accompanying Brief, CandyRific respectfully requests dismissal or, in the alternative, that the case be transferred to the U.S. District Court for the Western District of Kentucky.

Dated: April 20, 2015

Respectfully submitted,

Oliver, Price & Rhodes

s/ Erin A. Brennan

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Counsel for Defendant,  
*CandyRific, LLC*

**CERTIFICATE OF NONCONCURRENCE**

I, Erin A. Brennan, along with primary counsel for CandyRific, LLC, T. Morgan Ward, Jr., Esquire, contacted Plaintiff by phone and he does not concur in the within motion.

OLIVER, PRICE & RHODES

/s/ Erin A. Brennan

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 20, 2015, a copy of the foregoing was filed electronically with the Electronic Case Filing system of the United States District Court for the Middle District of Pennsylvania and served via first-class U.S. mail, postage prepaid, upon Plaintiff with a courtesy copy by email to all parties who have presently entered an appearance in this matter as indicated below.

**Via U.S. Mail**

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Oliver, Price & Rhodes

/s/ Erin A. Brennan  
Erin A. Brennan